In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1312

GRANT M. ACTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a consolidated action styled *Acton* v. *United States of America* (No. 21980), and *Clifton* v. *United States of America* (No. 21980-A), the Ninth Circuit held that petitioners' revocable prospecting permits, issued by the Atomic Energy Commission, did not confer property rights for which the Fifth Amendment requires compensation upon revocation. Clifton petitioned this Court for a writ of certiorari to the Ninth Circuit in No. 1289 Misc., this Term, and his petition

was denied March 3, 1969. For the reasons set forth in our memorandum in opposition filed in *Clifton*, this petition, too, should be denied.

Petitioners had received Atomic Energy Commission exploration permits to prospect for uranium on government land (the Yuma Test Station) in the Muggins Mountains of western Arizona. These lands had earlier been withdrawn from all forms of appropriation under the Public Land Laws, including mining and mineral leasing laws,[1] and put under the administrative control of the Army. Reflecting this, petitioners' permits contained the following qualification (Pet. App. 10):

> 5. The Commander, Yuma Test Station, shall have the right to withdraw this right of entry either in whole or in part at any time as he deems it required by military necessity. Such withdrawal may be only temporary or permanent and may be without prior notice, in which event it is agreed that evacuation will be made with the greatest possible expediency, as to personnel and equipment.

Subsequently, and before it had matured into a lease, petitioners' permit was permanently withdrawn for reasons of military necessity (R. 1). The government brought suit to condemn all outstanding interests in the land comprising the test station, but moved to dismiss petitioners and other permit holders as defendants on the ground that they possessed no compensable interest. This motion was denied without prejudice,

---

[1] Public Land Order 848, 17 Fed. Reg. 6099 (July 1, 1952).

and the holders and the United States then moved for summary judgment. The government's motion was granted, and the court of appeals affirmed.

The court of appeals' holding that the revocable prospecting permits were not property for which the Fifth Amendment requires compensation to be paid upon taking was plainly correct. The permit did not purport to create any vested interest in the government's land, but expressly stated its revocability. In this respect, it is akin to a license which, even though valuable to its holder, does not constitute property for which the government is liable upon withdrawal. *Louisville Bridge Co.* v. *United States*, 242 U.S. 409; *McNeil* v. *Seaton*, 281 F.2d 931, 934 (C.A. D.C.); *Sinclair Pipe Line Co.* v. *United States*, 287 F.2d 175 (C.Cls.). Prospecting permits are similar to grazing permits issued under the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, which are revocable without payment of compensation. *Osborne* v. *United States*, 145 F.2d 892, 896 (C.A. 9); *United States* v. *Cox*, 190 F.2d 293, 294, 295 (C.A. 10), certiorari denied, 342 U.S. 867.

Petitioners also argue that under Section 171 of the Atomic Energy Act of 1946, as amended, 68 Stat. 952, 42 U.S.C. 2221, the Commission is required to pay compensation for the revocation of any right to enter which is recognizable in equity (Pet. 6). This is not so. Section 171 merely requires the United States to "make just compensation for any property or interests therein taken or requisitioned * * *." That statute creates no additional property right; it does not require the United States to pay for the taking of

any interest which does not rise to the estate of private property within the meaning of the Fifth Amendment. Petitioners, as holders of recovable licenses, had no such property right.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SHIRO KASHIWA,
Assistant Attorney General.

S. BILLINGSLEY HILL,
JACQUES B. GELIN,
Attorneys.

MAY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 351089 701